

The Hague Conference on Private International Law and Asia

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Abstract: *This paper first introduces the Hague Conference in general terms. The second section describes more specifically what the Hague Conference does. The third section identifies the rationale for establishing HAPRO to promote the work of the Hague Conference in Asia. The final section identifies specific initiatives which HAPRO has taken and will continue to pursue within Asia.*

I. What is the Hague Conference?¹

1. The Hague Conference first met as a "conference" in 1893. The origins of the international body now known as the "Hague Conference" therefore go back 120 years. The Hague Conference became an inter-governmental organisation in 1955. Japan has been a member of the organisation since 1957.

2. The countries which participated in the early conferences in The Hague principally came from European civil law jurisdictions. But since 1955 an increasing number of members have come from civil and common law jurisdictions outside Europe and North America.

3. The result is that, as an organisation the Hague Conference has become more reflective of the viewpoints of the countries, regions and cultures of the world. Whatever it may have been in the late nineteenth century, the Hague Conference can no longer be described as Euro-centric or Western-dominated².

¹ This paper is a revised and updated version of a talk entitled "The Hague Conference: Promoting Cooperation in Civil and Commercial Matters in the Asia-Pacific Region" which I delivered at *The 2nd EU-Macau Cooperation Programme in the Legal Field -- Conference on International Judicial Cooperation* held on 28 - 29 May 2013 under the joint auspices of The Legal and Judicial Training Centre and The Law Reform and International Law Bureau of the Macao Special Administrative Region. I am grateful to Mr. Daniel Zhu Yong of HAPRO for assisting me in the preparation of both the Macau talk and this paper. I have also benefitted from the comments of participants in the Macau event.

² Cf. the view of Professor Mark Mazower in *Governing the World: The History of an Idea* (Allen Lane, 2012), at p.74: "[N]ineteenth century international law was double-faced; at the same time that lawyers justified the extension of colonial rule overseas, they defended its value

The Hague Conference has made special effort in recent times to transform itself from the forum of a few into an authentic voice for the many. Within the Conference, member states can now, through their representatives, debate and advocate how areas of civil and commercial law involving cross-border elements can best be harmonised across jurisdictions.

4. It has become "trendy" to speak of "globalism". Whether one agrees with the trend or decries it, as far as private international law is concerned, the Hague Conference was "globalist" before that term became fashionable. And, all the more today, the Hague Conference is unapologetically cosmopolitan in its outlook and outreach.

5. The Conference's General Council (consisting of representatives from 73 countries and the European Union)) meets regularly (usually in April) to forge a consensus on how specific areas of private international law can be harmonised for the benefit of all. That is by no means an automatic process. Sometimes, it may not be easy to achieve consensus. Sometimes attaining consensus may require protracted periods of patient discussion and negotiation. There may be setbacks.

6. But the long (possibly lonely) hours of debate and effort are worth it. Once reached, the consensus view of the General Council can be confidently advocated as the considered opinion of an inclusive multi-cultural (as opposed to only limited or parochial) membership. It is this non-political consensus that enables the Conference to speak with authority when promoting the Hague Conventions which the General Council has promulgated.

7. Interestingly, the last decade has seen a significant number of states which are not members of the Conference acceding to Hague Conventions. This phenomenon vindicates the Hague Conference's approach. As a "melting pot" of juristic traditions, the Hague Conference develops multi-lateral legal instruments (and offers technical assistance in connection with those instruments) in response to the practical needs not just of member states, but also of the rest of the world.

for the emergent society of sovereign national states in Europe (and when they remembered, the Americas)."

II. What exactly does the Hague Conference do?

8. The Conference's statutory mission is to work for the "progressive unification of the rules of private international law rules".³

9. One should not infer from this that the Conference is yet another NGO advocating worldwide law reform. The Conference is first and foremost a forum where member states negotiate, debate and adopt conventions in matters of private international law.

10. Between 1893 and 1904 the Conference adopted 7 conventions. Six conventions have been replaced by more modern instruments. From 1951 to 2008 the Conference has produced 38 conventions. The operation and utility of Hague Conventions is regularly reviewed by the Conference.⁴

11. The range of modern day Hague Conventions is broad. They have dealt with the following subjects (among others): the abolishing of the requirement of legalisation for foreign public documents⁵; the service abroad of judicial and extra-judicial documents in civil or commercial matters⁶; the taking of evidence abroad in civil or commercial matters⁷; the civil aspects of international child abduction⁸; the protection of children and cooperation in respect of inter-country

³ Statute of the Hague Conference on Private International Law, Art.1. The Statute was adopted during the 7th Session of the Hague Conference on 31 October 1951. It came into force on 15 July 1955.

⁴ In practice, Hague Conference promulgates a convention every 4 years. But, between 2000 and 2007, the Conference generated 3 conventions (relating to the International Protection of Adults (2000); the Choice of Court Agreements (2005); and the International Recovery of Child Support and other Forms of Family Maintenance (2007)). Since then no new convention has been produced. Thus, consistently with its purpose, the Hague Conference will be looking to put out a new convention within the next couple of years.

⁵ Convention (XII) of 1961. Known as the "Apostille Convention", over 100 countries (including Japan) are parties to this convention. This is perhaps the most popular of all the Hague Conventions.

⁶ Convention (XIV) of 1965. Ratified by Japan.

⁷ Convention (XX) of 1970. Ratified by Japan.

⁸ Convention (XXVIII) of 1980. Earlier this year, the Japanese Diet approved legislation implementing this convention. But the legislation is not yet in effect. See, generally, Colin P A Jones, "Towards an 'Asian' Child Abduction Treaty? Some Observations on Singapore and Japan

adoption⁹; the law applicable to certain rights in respect of securities held with an intermediary¹⁰; choice of court agreements¹¹; and international recovery of child support and other forms of family maintenance¹².

12. In general terms, the Hague Conventions fall into 3 areas of private international law: family law (especially the welfare of the child); civil procedure; and commercial law. It will be seen that some Hague Conventions deal with the determination of the applicable law in specific situations; others with resolving jurisdictional conflicts between countries; yet others with the recognition and enforcement of foreign judgments or other instruments; and still others with administrative and judicial co-operation between state authorities. Several Hague Conventions combine one or more of the foregoing aspects of private international law.

13. Some conventions may not yet have come into force, not having been ratified by a requisite number of states. But those conventions may nonetheless influence domestic legal systems of member and non-member states. That is because, by their genesis, the conventions may be regarded as reflections of best practice in relation to specific issues of private law. A convention may evidence a developing trend (*de lege ferenda*) in private international law.

14. Conventions may also serve as templates for efforts to unify private international law at a regional level. Nothing prevents countries within a region or a community of states (say, ASEAN) from “picking and choosing,” that is, adopting some or all of a convention for the purposes of domestic or regional legislation. But, in this respect, one hopes that a limited adoption will be a prelude to the accession by a country to a convention as a whole. After all, the widespread (or the potential for widespread) adherence by many countries to a convention would must be one of the foremost reasons for acceding to a convention in the first place. Why subscribe to a convention or part of it for only

Joining the Hague Convention," ASLI Working Paper No. 031, August 2013, available at www.law.nus.sg/asli/pub/wps.htm.

⁹ Convention (XXXIII) of 1993. Japan is not a party to this convention.

¹⁰ Convention (XXVI) of 2006. The convention is not yet in force. Japan is not a party.

¹¹ Convention (XXXVII) of 2005. The convention is not yet in force. Japan is not a party.

¹² Convention (XXXVIII) of 2007. Japan is not a party to this convention.

narrow regional purposes, when one can potentially enjoy the benefits of the convention with the rest of the world?

15. It would be wrong to suppose from what I have just described that the Hague Conference's work stops at legislation. The Conference also provides technical assistance (what might informally be called "back up support") for the implementation of conventions within a country.

16. At any given time, the Conference has legal experts in different areas of private law working within its Permanent Bureau. The Conference also enjoys access to world-renowned experts in international civil and commercial law fields.

17. The Conference can thus put together relevant teams of experts to advise states, especially member states, on how best to implement a given convention. The Conference can organise workshops and other events to provide training for judges, lawyers and government officials within a country or region relating to what needs to be done to apply a convention effectively in accordance with best practice. However, because resources are limited, priority is given to requests for technical assistance from member states.

18. From time to time, Special Commissions have been held at The Hague to review the practical operation of a convention, to identify good and bad practices, and to come up with ways of resolving problems. In the past, such commissions have been convoked for the service abroad and taking evidence abroad conventions; the child abduction convention; the inter-country adoption convention; and the various conventions on maintenance (support) obligations.

19. The Conference is itself a source of constantly updated information relating to its conventions and their implementation. For example, handbooks on the operation of certain conventions, are regularly published and maintained by the Conference. Much useful information is publicly available for free through the Conference's website (www.hcch.net).

III. What role does HAPRO play?

20. HAPRO is new. It officially opened its doors on 13 December 2012. One might ask: why have a regional office for the Asia?

21. It has become a cliché to characterise Asia as a vibrant and dynamic area. The region has undoubtedly shown strong economic growth over the last few decades. It has also shown resilience in these times of current financial difficulty.

22. As a corollary to economic growth, recent years have seen more and more Asian countries become increasingly involved in the work of the Hague Conference, even though many such countries are not actually members of the Conference. For example, 4 Asia Pacific Regional Conferences have been held here in recent years. These conferences benefitted from the strong participation, keen interest and cooperation of member and non-member states within Asia.

23. On this basis, it was logical for the Hague Conference to establish HAPRO. The Hague Conference has only ever had one other regional office. That has been (and continues to be) in Latin America, another region which has shown strong economic growth potential.

24. But HAPRO faces challenges unique to Asia. Those problems are not present to the same degree in Latin America, where to a large extent populations across different countries (even when ethnically diverse) share a common language, culture, history and religion and (most importantly) adhere to similar civil law legal systems.

25. With "Asia" or the "Asia Pacific," there is to begin with a question of defining HAPRO's constituency. What are the precise bounds of "Asia" or "the Asia-Pacific"? Assume, however, that the ambit of "Asia" and "the Asia-Pacific" may be geographically defined in some universally accepted manner. There would still remain the fact that jurisdictions within "Asia" or "the Asia-Pacific" (however delimited) are widely spread out geographically and highly diverse in terms of history, culture, religion, language, economy, and legal system.

26. Focus on the last attribute. Within Asia, there are civil law, common law, and mixed civil and common law jurisdictions. There are jurisdictions whose

cultures are traditionally "Eastern" in outlook, but there are also those that are essentially "Western" in mindset. Many countries within the region have an eclectic mix of traditions and cultures.

27. Despite all these challenging features, the increasing trade and investment connections among the great diversities of Asia or the Asia Pacific make it vital and urgent to have a coordinated and harmonised regional network of private international law. Such a network would benefit not only Asia or the Asia Pacific, but the rest of the world in its dealings with this region and vice versa.

28. The reality of a diversity of identities (including legal cultures) within the Asia is, paradoxically, a compelling reason for HAPRO's existence. If Asian countries aspire for continued economic growth to the benefit of their populations, they will increasingly have to interact (communicate, trade, invest, etc.) with each other and the rest of the world. Such interaction is best facilitated through a greater degree of harmonisation (1) among the laws of the region and (2) between regional laws and the laws of the rest of the world.

29. Rather than re-invent the wheel, Asian countries can look to the adoption *en bloc* of packages of Hague Conventions to provide them with a body of civil and commercial laws which are readily applicable across national borders¹³.

30. There is a natural symbiosis of interests.

31. On the one hand, if it is truly to be a global body the Hague Conference needs to seek out new members. The Conference must be as inclusive as it can be.

32. New members are vital towards ensuring that future conventions reflect the widest possible range of views and traditions. The input of new members is equally important to ensure that present and future conventions remain relevant to the practical needs of all.

¹³ I have in mind here an analogy with the wholesale adoption of Roman law by continental European states from the 12th century onwards. See, for instance, A Watson, *The Making of the Civil Law* (Cambridge, MA: 1981) on what Professor Watson has called the "block effect" of Roman law.

33. There are presently relatively few Asian states (no more than about 10) that are members of the Hague Conference. HAPRO is here to put forward the case for membership of Asian states in the Conference as persuasively as possible. HAPRO's message in this respect is simple and direct: The Hague Conference has not forgotten about non-member states in Asia. On the contrary, the Conference needs those states if it is to accomplish its work effectively. It invites them all to join. It has opened HAPRO to learn more about their concerns at first-hand and convey those concerns directly to the General Council in The Hague.

34. On the other hand, if more Asian countries are to be convinced that it is a good thing to implement Hague Conventions, there is a need to provide back-up which is specifically tailored to individual circumstances. Jurisdictions here may be considering whether to accede to this or that convention. But they may need technical assistance in order to lay the groundwork for the adoption of a given convention. HAPRO is here to provide whatever assistance may be necessary.

35. In short, HAPRO is not some vague abstraction, inchoate concept, or work-in-progress. HAPRO is here and now and its mission is eminently pragmatic. HAPRO is meant to be the hub of a network through which Asian countries can communicate their legislative and administrative needs to one another, to the Permanent Bureau, and the member states of the Hague Conference. HAPRO is a forum for fostering cooperation among countries both here and beyond for the purpose of rationalising civil and commercial laws across boundaries.

III. What exactly is HAPRO doing?

36. I will conclude by sketching out some of the concrete ways in which HAPRO has been carrying out what I have just described.

37. First, HAPRO has been participating in presentations, seminars and workshops throughout the Asia Pacific to promote the benefits of Hague Conventions and to provide guidance on their implementation in accordance with best practices.

38. For example, in late June, the present Secretary-General of the Hague Conference (Dr. Christophe Bernasconi) and HAPRO took part in an APEC

Workshop in Medan on the "Simplified Authentication of Public Documents Abroad" to publicise the Apostille Convention among business people in Asia.

39. On 23 and 24 September 2013 the Hague Conference and HAPRO held a conference on the Choice of Court Agreements Convention in conjunction with Wuhan University in the PRC. The conference was held to discuss how that convention could lead to a reduction of the costs involved in enforcing commercial judgments in other countries.

40. Let me dwell on this last subject a little as it will be the subject of Professor Yeo's presentation.

41. The Choice of Court Agreements Convention (it is widely believed) has the potential to do for litigation what the 1958 New York Convention¹⁴ has done for arbitration¹⁵. By making it easier to enforce judgments in disputes arising out of contracts with express jurisdiction clauses, the Choice of Court Agreements Convention could make litigation competitive with arbitration as a means of commercial dispute resolution. Competition between international commercial litigation and arbitration could then lead to a significant lowering of the costs of both and arbitration, to the advantage of the public at large.

42. I delivered a talk on this theme at Australian National University in Canberra on 20 August 2013. I also spoke about how the Choice of Court Agreements Convention could provide some of the necessary legal under-pinning for ASEAN's 2015 Economic Community initiative at a conference in Hong Kong on 17-18 September 2013. I will be making a similar presentation in Singapore on 29 October 2013. HAPRO's advocacy of the convention in different forums through the Asian Pacific can help to accelerate the coming into effect of the convention and the enjoyment of its potential benefits.

¹⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations in New York on 6 July 1958. There are currently 148 states which are parties to the New York Convention. Japan acceded to the convention in 1961.

¹⁵ There has been considerable academic and non-academic writing on the history, advantages and limitations of the Choice of Court Agreements Convention. See, in particular, L E Teitz, "The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration" (2005) 53 Am J Comp L 543; JJ Spigelman, "The Hague Choice of Court Convention and International Commercial Litigation" (2009) 83 ALJ 386; Tu Guangjian, *A Study on a Global Jurisdiction and Judgments Convention* (Sweet & Maxwell, 2009).

43. Second, HAPRO is currently working on setting up an organisation to be known as the "Friends of HAPRO". Persons interested in supporting HAPRO's activities can become members of the Friends by paying a modest annual membership fee.

44. The Friends will be sponsoring lectures, dinners and lunches where private international law topics can be debated. The Friends will also set up a website which will include a calendar of private international law-related events in the Asia Pacific region and a database of Asia-Pacific private international law cases. Such cases are usually overlooked by standard legal databases, not least because the cases are difficult to find and are in Asian languages (as opposed to English). The Friends' database aspires to put a greater worldwide focus on Asia Pacific jurisprudence, so that it will become better known and understood.

45. Third, HAPRO has been establishing links and meeting with national organs, judiciaries, chambers of commerce, colleges and universities. That is meant to help HAPRO identify regional private international law issues and problems (particularly in relation to the implementation of Hague Conventions) and to articulate the same to the Permanent Bureau in The Hague.

46. In terms of universities, for instance, HAPRO has entered into a memorandums of understanding with Kyushu University in Japan; Hughes Hall in Cambridge; Gujarat National Law University in India; De La Salle University College of Law in the Philippines. It is hoped that memorandums with other law institutions (for example, in Hong Kong, the PRC, Singapore, Thailand, Indonesia and Australia) will follow soon. In the course of this present trip, I have been making an effort to forge connections with Japanese law schools.

47. What is the purpose of these memorandums between HAPRO and law schools in the region? The memorandums set up a flexible framework whereby law students can serve "marshallships" at HAPRO's Hong Kong premises for an agreed period. During that period, the students would assist HAPRO in carrying out its work. Students might thereby help HAPRO with conferences, workshops or presentations in connection with various Hague Convention; help the Friends to translate (or write English summaries of) Asian private international law cases for the compilation into the Friends' website database; prepare draft translations

in Asian languages (including Japanese) of key Hague Conventions¹⁶ and Hague Conference materials; and so on. During a marshallship, if time and opportunity permit, HAPRO might arrange short internships of a few days with Hong Kong judges, barristers or solicitors, so that students from civil law jurisdictions in particular can observe the common law in action at first-hand.

48. Fourth, HAPRO has been working to expand the number of Asian judges in the International Hague Network of Judges (IHNJ). The IHNJ is a network of family law judges who liaise with each other in relation to the handling of child adoption, child abduction and other family law matters.

49. In a 2009 article¹⁷, Mr. Philippe Lortie of the Hague Conference's Permanent Bureau said this about the functions of the IHNJ:-

“[J]udicial communications under the [IHNJ] are twofold. They are either general judicial communications or direct judicial communications in specific cases....

In the first case, such communications can either be purely internal (*i.e.*, within the domestic court system or in relationship with Central Authorities) or international with other Members of [IHNJ]. Such communications can be very helpful: experiences regarding procedures and methods, which have been developed in the course of past and current proceedings, can be exchanged between judges. Through such communications, judges from different jurisdictions may be able to inform each other and learn from one another about the handling of proceedings involving applications for return and custody under the 1980 Hague [Inter-Country Adoption] Convention; it will also assist in promoting consistent interpretation of other Conventions. Judges will then better understand how their colleagues work in other jurisdictions. Ultimately, such exchanges may well lead to an increased appreciation of the different “jurisdictional cultures....

¹⁶ Until 1960 Hague Conventions were drafted in French. Since then they have been drawn up in French and English. Currently, efforts are underway with the assistance of marshalls to translate Conventions into other languages, including Japanese, Chinese and other Asian languages.

¹⁷ P. Lortie, “Background to the International Hague Network of Judges”, *The Judge's Newsletter on International Child Protection*, vol.xv, Autumn 2009.

As for the latter case of communications, one cannot emphasise enough how useful direct judicial communications in specific cases can be to resolve some of the practical issues surrounding the return of an abducted or illegally retained child. Furthermore, they may result in immediate decisions or settlements between the parents before the court in the requested State. In particular, courts could suggest and produce settlements between the parents to facilitate the return process, to remove practical obstacles to return, to help to ensure that the prompt return may be effected in safe and secure conditions for the child (and sometimes for an accompanying custodial parent), and to pave the way for any proceedings on the custody issues which are to take place in the country to which the child is returned. Direct international judicial communications may reduce the number of decisions refusing return. For example, some courts may refuse an application for return based on Article 13 *b)* of the 1980 Hague Convention because the mother who looks after the child is not allowed to enter the country to which the child is to be returned. In such cases, the concerned judges, through direct communications in writing and/or telephone, can ensure that arrangements are in place for the immediate return of the child, accompanied by the abducting parent. In some cases, the parent seeking the return of the child may offer some 'undertakings' in relation to the return. How to ensure the enforceability of such undertakings in the State to which the child is to be returned is an important matter, and may be clarified in the course of judicial communications."

50. This is a straightforward example of how judicial cooperation can be beneficial to all relevant parties not just within this region, but elsewhere.¹⁸ The Asia Pacific can only benefit from an increased presence of its judges within the IHNJ. It is not a pre-requisite to having judges representing a country in the IHNJ that the relevant country be a party to the Hague Inter-country Adoption Convention. I hope then that in the near future there can be Japanese and many other Asian judges in the INHJ.

51. The foregoing is only a selective outline of the work that HAPRO has been doing. As HAPRO's Representative, I look forward to your active support in the weeks and months to come. HAPRO cannot do its work alone. It is only together

¹⁸ For further discussion on cross-border judicial communication, see Hague Conference on Private International Law, *Direct Judicial Communications: Emerging Guidance Regarding the Development of the International Hague Network of Judges for Direct Judicial Communications in Specific Cases, within the Context of the International Hague Network of Judges* (2013).

that we can develop private international law to the benefit of everyone, not just in Asia, but in the entire world. It is only by mutual cooperation that we can achieve the purpose of the Hague Conference.